

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
DR, POSNER SHOE CO., INC.)

Appearances:

For Appellant: Maurice Knapp, Attorney at Law

For Respondent: Burl D. Lack, Chief Counsel;
John S. Warren, Associate Tax Counsel;
Jack L. Rubin, Junior Counsel

O P I N I O N

This appeal is made pursuant to Section 25667 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of Dr. Posner Shoe Co., Inc., to a proposed assessment of corporation income tax in the amount of \$130.57 for the year 1955.

Appellant is a corporation organized under the laws of New York. It is engaged in the manufacture and sale of children's shoes, and maintains its principal office in New York and its manufacturing and warehousing facilities in Pennsylvania. It has no office in California. Its products are sold to customers throughout the United States. During the period in question an employee of Appellant, Mr. Harry Geller, worked as a salesman in a territory consisting of California, Arizona, Nevada, and Oregon. Appellant supplied Mr. Geller with a sample of each style of shoe manufactured by it. Mr. Geller's compensation was on a commission basis, out of which he paid his own traveling expenses.

When---Mr. Geller received an order, he would send it to Appellant's New York office for acceptance and billing. The merchandise would be shipped from a Pennsylvania warehouse directly to the customer. Sales to California customers arising from orders solicited by Mr. Geller in California, amounted to \$201,960.55. The California sales solicited by Mr. Geller constituted approximately 87 percent of the total sales solicited by him,

Upon demand by the Franchise Tax Board, Appellant filed a return for the year in question under Chapter 3 of the Bank and Corporation Tax Law, which provides for the corporation income tax, but reported no tax due. Using a three

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factor formula of property, payroll and sales the Franchise Tax-Board allocated a portion of Appellant's income to sources in this State, and, in July, 1956, issued the assessment in controversy here. In applying the formula, sales solicited in California were considered California sales and commissions paid the California salesman as California payroll.

Appellant contends that the application of the tax to its activities violates the commerce and due process clauses of the United States Constitution. Appellant does not dispute the correctness of the allocation formula nor of the mathematical computations.

We have previously upheld the application of the corporation income tax as against contentions precisely the same as those here made by the Appellant and on facts substantially identical to those here involved. (Appeal of Walker T. Dickerson Co., Cal. St. Bd. of Equal., October 27, 1953 (CCH, 1 Cal. Tax Cases, ¶200-245), (P-H, St. & Loc. Tax Serv., Cal. ¶13,136).) We there relied upon West Publishing Co. v. McColgan, 27 Cal. 2d 705, aff'd. 328 U.S. 823, and International Shoe Co. v. Washington, 326 U.S. 319. The West Publishing case held that there was no violation of the Constitution in applying the California corporation income tax to a corporation selling its products to California residents exclusively in interstate commerce. In that case, the corporation had a number of salesmen in this State who used space in the offices of certain attorneys. The International Shoe case held that a foreign corporation was amenable to service of process in the State of Washington, in a suit for unpaid unemployment insurance tax. The corporation had salesmen in the State, but no offices there.

Two decisions recently issued by the United States Supreme Court demonstrate conclusively that the Dickerson appeal was correctly decided.

In Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959) the Supreme Court has made it clear that the Commerce clause is no barrier to the imposition of a net income tax on a person engaged exclusively in interstate commerce, provided there is no discrimination against that commerce and the allocation formula is reasonable. The court also held that the due process clause was satisfied in the Northwestern States Portland Cement case. Unlike the facts before us, however, the taxpayer there had an office as well as employees in the taxing state.

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That the existence of an office in the taxing state is not essential to due process is shown by the decision of the Supreme Court in Scripto, Inc. v. Carson, _____ U.S.

(March 21, 1960). That case involved a Georgia corporation which was required by the State of Florida to collect a use tax on products sold to Florida residents. The court held that the due process requirement of "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax" was met by the presence in Florida of representatives who solicited sales of the corporation's products. In that case, as in the case before us, the corporation had no office or other place of business in the state which imposed the tax, (See also, International Shoe Co. v. Fontenot, 107 So. 2d 640, cert. den., 359 U.S. 984 (1959); Brown-Forman Distillers Corp. v. Collector of Revenue, 101 So. 2d 70, app. dism. and cert. den., 359 U.S. 28 (1959).)

In the determination of this matter, we have taken into consideration Public Law 86-272, a Federal act which places certain limitations upon the power of a state to tax income derived from interstate commerce. By its terms, the act does not apply to taxes "assessed" prior to its effective date, September 14, 1959. For the reasons stated by us in Appeal of American Snuff Co., this day decided, we conclude that the tax in question was "assessed", within the meaning of the act, before the effective date of the act,

O R D E R

Pursuant to the views expressed in the Opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 25667 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Dr. Posner Shoe Co., Inc., to a proposed assessment of corpora-

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tion income tax in the amount of \$130.57 for the year 1955,
be and the same is hereby sustained,

Done at Sacramento, California, this 20th day of April,
1960, by the State Board of Equalization.

John W. Lynch, Chairman

George R. Reilly, Member

Richard Nevins, Member

_____, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary